



EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS

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DISCUSSION PAPER ON ADVANCING INTERNATIONAL FAMILY MEDIATION IN CASES OF INTERNATIONAL CHILD ABDUCTION

BACKGROUND INFORMATION AND HISTORY OF THE EJN MEDIATION WORKING GROUP

On 14 October 2010 the Belgian presidency of the EU Council held a ministerial seminar on international family mediation in cases of international parental child abduction.

In 2009, in preparation for this seminar, the Belgian Central Authority had asked the other Central Authorities of the Member States if they knew of ‘the existence of any legislation or practice regarding family mediation applicable in these cases’. On the basis of the answers received from the Central Authorities, the Belgian presidency drew up a non-paper and a questionnaire, which were sent to the Member States’ delegations in early 2010. The non-paper and the questionnaire containing three questions solicited numerous replies and comments from the Member States. The Belgian presidency took these into account when preparing its draft conclusions, which were examined and amended during the seminar. The JHA (Justice and Home Affairs) Council of 2 and 3 December 2010 took note of the final conclusions, which called for the setting up of a Working Group. The decision to set up the Working Group was taken during the annual meeting of the European Judicial Network (EJN) held on 21 January 2011.

The Working Group’s mandate is *‘to draw a synthesis of the different related initiatives and works, notably those of The Hague Conference on Private International Law [...]’, with the possibility of appealing to ‘the expertise of the European Parliament Mediator for International Parental Child Abduction,¹ of mediators and organisations specialised in cases of child abduction, and of liaison judges for cases of child abduction’, to report about its work and [...] propose to the Council and the Commission the most appropriate and efficient means to promote and improve the use of the international family mediation in cases of international parental child abduction, in compliance with the applicable legal instruments as well as when the abduction occurs towards a State which is not Party to any Conventions.*’

Moreover, given the specific focus of the mandate — cross-border parental child abduction — the Working Group considers that the analysis and conclusions need to be discussed in a general context of international family mediation, as child abductions often form a part of international family-related proceedings (questions related to property owned by the couple, maintenance obligations, etc.). However, the Working Group will focus on international

¹ See www.europarl.europa.eu/aboutparliament/en/000c205a13/Child-abduction-mediator.html.

family mediation in child abduction cases as the mandate of the Working Group is clear. The discussion should also take due account of the paramount principle in this area, namely the best interests of the child, and that parental agreements are in the best interest of the child.

The first meeting of the Mediation Working Group set up by the EJM was held on 7 April 2011.

A brief brainstorming session was held in response to the members' request for the Working Group to raise specific and more detailed questions.

Several members raised questions in relation to:

- the language used in mediation;
- the costs of mediation (legal aid)
- the public or private (NGOs) nature of the mediation.

The proposals (questions) put forward by the Working Group (WG) were included in a questionnaire and the Member States were invited to provide the WG with their respective answers.

On the basis of the questionnaire, the members of the WG agreed that they would submit electronically their replies concerning the update of the available data and the answers to the additional questions.

There are currently 15 Member States participating in the WG (BE, BG, DE, IE, GR, ES, FR, IT, LV, HU, MT, NL, PT, SI and UK). Hence, the group can therefore supplement the general information received by the Member States by personal contributions. In this regard it does not claim full coverage of all EU Member States with its expertise.

The second meeting of the WG took place on 22 May 2013, mainly to discuss the content of this discussion paper.

Family mediation in an international context

The aim of the Working Group is to advance the implementation of this method of dispute resolution in line with existing European/international instruments and achievements:

- at EU level: Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations;
- at the level of the Council of Europe: Recommendation No. R (98) 1 of the Committee of Ministers to Member States on family mediation adopted on 21 January 1998; the Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters;
- at the level of the Hague Conference on Private International Law: 1) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; 2) the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children; and 3) the Guide to Good Practice on

Mediation, in particular under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

In the context of this paper, cross-border family mediation involves a process conducted by one (or several) impartial, qualified third person(s), without the power to decide, who is (are) taken into the parties' confidence in order to help them regain communication and thus be able to reach an agreement on their own, and to ensure that parental decisions take account of the best interests of the child, if a child is concerned by the cross-border family conflict

Scope of international family mediation

The term 'family matters' covers a broad range of disputes, from purely private matters to those involving public authorities.

Family matters include:

- parental responsibility and access rights;
- child abduction;
- child protection measures;
- maintenance of children or ex-partners;
- other consequences of divorce or separation.

THE RESULTS OF THE QUESTIONNAIRE

To understand the different systems in the Member States and to identify common ground, it seemed necessary to gather information on a number of key elements of international family mediation so as to bring forward its implementation in international family conflicts.

The following Member States replied to the questionnaire: Belgium, Bulgaria, the Czech Republic, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Poland, Portugal, Slovakia, Finland, Sweden and the United Kingdom.

It transpires that legal rules on family mediation or on-going projects exist in most of the Member States. However, some Member States pointed out that they did not apply special legal rules to family-specific mediation (BE, EE, SK).

The status of mediators differs from one Member State to another. In some Member States mediators are dependent on a public organisation (CZ, MT, FI); in others, they have the status of a private person (BE, BG, GR, ES, PL) but work closely with the government (UK); finally, in some Member States, they can have either a private or a public status (DE, HU, PT).

All the Member States that replied to this point indicated that mediators received **appropriate training** (BE, BG, CZ, DE, GR, ES, FR, IT, LV,LT, LU, HU, MT, PL, PT, SK,SE, UK).

In most Member States mediators are either **listed** in a public or private register (BG, CZ, DE, GR, ES, LU, HU, LV, MT, PT, PL, SK, UK) or a licence-system has been put in place and is often run by the Ministry of Justice (BE, ES, GR, LU, SK).

As regards the linguistic organisation of mediation, some Member States pointed out that they use their national language(s) (MT, PT, UK), although an interpreter may intervene (SK); in most Member States, this point is not covered by specific rules (BG, DE and GR) or mediators may, on their own initiative, mention the language(s) they are able to speak (BE, CZ).

In a number of Member States, the parties benefit from **cost-free** mediation (FR, MT, SK and FI), at least in matters of judicial mediation (DE and HU). In addition, mediation can be covered by the legal aid system (BE, PT, and, under certain conditions, the UK). In other Member States, the parties are charged for the mediation (CZ, ES, LU, PL and UK), as well as FR subject to agreement with the National Office for Family Allocations and depending on the salary of the parties; HU in a case of judicial mediation and ES (except where children are involved).

The length of the mediation procedure may be determined by the court concerned (DE and FR). Most national legal systems provide for a maximum length: BE - 3 months in cases of judicial mediation with the option to extend); BG - 6 months; MT 2 to 3 months; PT - 3 to 4 months; ES - 2 months with the option to extend); UK - 1 to 5 sessions of 60 to 120 minutes; HU - 3 months; GR - 3 to 6 months in cases of judicial mediation; and CZ – no more than 3 months in cases of judicial mediation. SK does not impose a precise limitation.

In several Member States, the **judicial proceedings** are **suspended** (BE, GR and ES) or at least for a limited period (PT – 6 months; CZ - 3 months; PL - 1 month), but not automatically (DE, FR, UK).

None of the Member States has specific legislation relating to the issue of **parental child abduction** and mediation. Most of the Member States pointed out that the general rules apply to this particular issue (BE, BG, CZ, DE, EE, GR, ES, FR, PL, SK and UK). In several Member States, this issue is currently not handled by means of mediation (IT, LU, HU, MT, FI and SE).

Several Member States are currently carrying out, a more or less advanced **pilot projects** (CZ, PL, DE). Other Member States have fully implemented their pilot project (UK, DE). Some of them are handled within the central authority (BE, FR, LT and PT) or in cooperation with the central authority (DE), where specific rules on co-mediation have been established.

Two Member States referred to the introduction of **videoconferencing** in matters of parental child abduction (DE, CZ).

ACCESS TO SPECIALISED INTERNATIONAL MEDIATORS

Specialised training

Member States are aware that it is necessary for citizens to have access to mediators who have been trained specifically in international family mediation in child abduction cases. However, it transpires that not in all the Member States such special training has been sufficiently developed.

MiKK in cooperation with Child Focus, the Katholieke Universiteit Leuven and with the support of the Dutch Centre for International Child Abduction created a training program for international family mediation. Project was cofinanced by the European Commission. The final goal of the project is the creation of a network of family mediators in Europe. The website of the network is www.crossbordermediator.eu.

Further thought should be given to ways of providing future international mediators with a **harmonised education or at least with content that reflects some harmonised standards**. Mediators must have access to a minimum of information on the procedure mechanisms applied in several international instruments such as European Regulations and the Hague Conventions relating to international child protection and in particular with regard to child abduction.

In addition, regular exchanges between certification organisations and professional mediator organisations should be promoted.

Online courses offer an additional possibility for developing and providing training.

Proposal for training content

- sociological and cultural aspects of international child abduction;
- study of European and international legal instruments (Hague Conventions of 1980 and 1996, Brussels IIa Regulation, etc.);
- legal aspects of mediation including timelines and cooperation with the legal professions;
- specific communication practices in the framework of international family mediation (co-mediation, online mediation, etc.);
- the hearing of the child in the mediation;
- practical cases.

List of international family mediators

Despite different systems (mandatory or voluntary mediation) and divergences as to the status of the mediator (public/private/mixed) in Europe, it is crucial for citizens to be able to access mediation easily. Thus, different stakeholders in family litigation (such as judges, central authorities or private or public mediation organisations) must facilitate this access, by providing **updated lists** of family mediators and, if possible, by including at least the following points which are a minimum standard of information:

- contact details;
- qualifications (certificates/degree(s));
- geographical scope of their intervention;
- previous experience in international family mediation and in particular in cases of child abduction, if any;
- the accepted means of communication;
- language skills;

- other relevant information.

Furthermore, a list of international family mediators in each Member State should be available on the Internet. If mediation is not regulated by the State, several lists of international family mediators could be made available by several certification organisations.

Costs of mediation

The use of mediation may often be influenced by its costs. Therefore, it seems important for mediation to be **easily accessible** from a financial point of view. The **free mediation** which exists in some Member States obviously facilitates access to mediation. This also applies when those costs can be covered by the **legal aid** system.

However, where the parties are charged right from the first information meeting on mediation, it is crucial for them to have **transparency** with regard to the costs of any mediation. In practical terms, this transparency could be achieved by preliminary fixing of mediators' fees by law or by judges. In addition, the parties should have access to lists of fees.

Framework contracts between mediators or mediation organisations and central authorities could be another way of guaranteeing an appropriate price.

Means of communication and linguistic issues

This aspect of mediation remains an important issue, especially in the framework of international family mediation.

Generally speaking, the physical presence of the parties during the mediation is important.

Concerning languages, it is ~~vital~~ an advantage for the mediator to speak the language of both parties, or at least the common language (if the couple has one). In cases of bi-cultural co-mediation it might be sufficient for a mediator to speak the language of one party and understand the other if no other solution can be found. Parties must be able to understand all legal terms. The point of finding a mediator who speaks the language of the parties is not just that of limiting costs because interpretation is not required. There is also the psychological aspect and the need for the parties to understand what they are agreeing to.

The introduction of **modern** means of communication (telephone, skype, videoconferencing, webcams, etc.) helps to reduce costs and organise mediation if physical presence of the parties is not possible. Such technical instruments should be available in every Member State and 'long-distance' mediation should be tested.

Secure interactive software for mediation should be set up to support mediation.

Moreover, whatever language is used for the mediation, it is important that everybody involved understands the language and the terminology used by the mediator(s).

The mediation contract

At the very beginning of mediation, a draft protocol must be established to provide the parties with **legal certainty** regarding **the mission of the mediator(s) and the development of the mediation**, as well as **the effects of the mediation on the legal situation** of the parties and of the child.

This document should also guarantee impartiality and confidentiality, which are crucial principles for successful mediation. Further, it is very important to agree on the costs. For these reasons, the parties involved in mediation (the mediator(s) and the parties) should agree in written form on the terms and conditions of mediation.

THE RELATIONSHIP BETWEEN MEDIATION AND THE COURT PROCEEDINGS

It would appear that mediation in the family sector is rarely used before the action is brought to court. Thus, whenever a family dispute arises, parties opt in the first place for a judicial dispute resolution.

Considering the effectiveness of the recourse to mediation as a preventive system method to solve the problems arising from the change of residence of one of the parents in mixed couples, mediation should be highly recommended in all cases involving international couples with minor children. However mediation should not be considered a universal panacea to be used in all abduction cases. To ensure suitability for mediation as well as to assuage any concerns and enhance parental understanding of the process it would be good practice to introduce into the procedure a screening interview.

Mediation should never serve as an excuse for one party to postpone the resolution of the conflict. This is of particular importance in child abduction cases where timing is crucial (see Articles 11 of the 1980 Hague Convention and the Brussels IIa Regulation). It is important to underline this principle whenever this alternative dispute resolution method is taken into account. **Mediators must inform the parties explicitly about this during the information phase or at the beginning of the mediation.**

Depending on the circumstances of the case, the child's involvement in the mediation should be considered, although it should not be mandatory to hear the child during mediation.

In addition, it is worth pointing out that in some systems mediation can be implemented after the action has been brought to court. In this case, close co-ordination with the judicial proceedings is of particular importance.

Legal effects of the mediated agreement

The parties' agreement at the end of mediation should be documented in writing in the Member States concerned by the situation of the parties.

To ensure that the agreement is legally binding, it must at least be delivered in **written form** and **signed** by both parties. Often there exist additional requirements under national law, e.g.

approval by a court. This agreement must be formulated **as precisely as possible** so as to avoid any subsequent discussion at the moment of its recognition or enforcement. Moreover, the parties should have access to **information on the legal effects** of the agreement in both MS concerned and on the **precautions to take in order to ensure its enforceability** in both Member States in accordance with international jurisdiction rules. Cooperation between the Member States is very valuable and can be established e.g. via the network judges and the central authorities.

The role of central authorities

When it comes to the specific issue of child abduction, mediation provided by the central authorities would be a distinct advantage. In accordance with the numerous international and European instruments applicable (in particular Article 55 of the Brussels IIa Regulation and Article 7 c) of the 1980 Hague Child Abduction Convention), starting from the moment a case is received, the central authorities are invited to provide useful information about any mediation procedure.

Secondly, for mediation to play an effective role in abduction cases, each Member State has to fully meet their obligations and be a “good returner”.

It follows that any mediation intervention needs to take place within the six week deadline otherwise it gives rise to the defence of “settlement” and it is also a disincentive for the left-behind parent if mediation is a protracted process.

In addition, mediation should also be considered after a return is ordered to avoid protracted litigation in the country of habitual residence on the child’s return.

Effective access to international family mediation

If a person wishes to initiate mediation (i.e. a judge, a lawyer, a staff member of a central authority or any other person dealing with people in conflict), that person needs to understand what mediation is and must be able to offer the necessary information to the parties.

If that person is to be in a position to do so, he/she needs to receive tailor-made information about mediation and must be trained in how to approach it efficiently.

It would therefore be very useful for stakeholders in the area of justice to receive a basic introduction to mediation in the course of their professional training.

Mediation will only reach its full potential if mediation is encouraged by these stakeholders (lawyers, judges, ...).

ROLE OF THE MEMBER STATES AND THE EUROPEAN INSTITUTIONS

Website

The European Union can support the Member States in promoting the use of international family mediation by providing a dedicated website.

General information, up-to-date information relating to each Member State and the contact points concerned with this matter could be published on the website. It would also be helpful to provide a link to a list of qualified mediators for each Member State and training centres in every Member State.

The European Judicial Network in Civil and Commercial matters could help to create a network of courts that have services of mediation especially to promote mediation as a preventive system method.

Furthermore, the work of the Hague Conference on Private International Law in this area should be mentioned on the website with a view to bringing it to the Member States' attention.

The European Union could invite Member States to keep their information up to date and to inform stakeholders and the general public about this website.

Cooperation

The European Union can encourage the Member States to maintain the quality of mediation by making it easier for mediation providers and certification centres to recognise each other's training courses and certificates.

Member States should be encouraged to ensure enforceability of mediated agreements at national and cross-border levels.

The building of national working groups, composed of representatives from all professions involved, helps to achieve these goals and Member States should be encouraged to build such national working groups.

Pilot projects

The European Union can support cross-border projects which promote recourse to international family mediation. The European Commission will be invited to fund such projects via its funding programmes dedicated to civil justice.

Training of stakeholders in the area of justice

The European Union should invite Member States to inform stakeholders in the legal area of the potential of international family mediation by providing a basic introduction to mediation in the training provided prior to qualification.

CONCLUSIONS

The members of the Working Group would like to highlight the following points:

- the need for mediation in international cross- border family cases, including child abduction, and ways to promote it among professionals and individuals;

- a clearly emerging demand for the supply of specialised knowledge (training needs) and sharing information and experience based on the experience that some MS already have;
- the importance of reinforcing cooperation among all stakeholders in mediation (in particular the parties to the conflict, judges, central authorities, lawyers and child-protection institutions);
- the importance of strengthening the flow of information and networking at EU level among relevant players (mediators, public institutions and specialised private entities);
- the proposal to establish a cross-border family mediation website;
- the importance of transparency in relation to costs, the usefulness of making lists of specialised mediators available, and of facilitating the use of several languages (the mediator(s) should preferably speak the languages of the parties or their common language);
- the need to develop and apply modern and secure means of communication, including IT tools specifically designed for cross-border family mediation purposes;
- the importance of support (by the Member States and the EU) for bi-national projects allowing for an exchange of detailed information on practices;
- the need to make mediated agreements legally binding and enforceable in the Member States concerned and to provide the relevant information to this effect, e.g. with regard to requirements under national law and rules on international jurisdiction.